SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

W. WILLARD WIRTZ, Secretary of Labor,
Respondent,

vs.

LOCAL UNION NO. 705, HOTEL AND RESTAURANT EMPLOYEES AND BARTENDERS UNION, AFL-CIO,
Petitioner.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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WO. 2-8745—WO. 2-8732

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Local Union No. 705, Hotel and Restaurant Employees and Bartenders Union, AFL-CIO, petitions for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit, entered in this case on February 14, 1968.

OPINIONS BELOW

The opinion of the Court of Appeals (App. A infra p. 13) is reported at 389 Fed.2d 717. The Order of that court denying the Petitioner's petition for rehearing (App. B infra p. 21) is unreported. The Opinion and Order of the district court denying Motion to Dismiss (App. C infra p. 22) and the Order of the district court granting the Motion to Dismiss and vacating its previous Order (App. D infra p. 28), are unreported.

JURISDICTION

The decision of the Court of Appeals was rendered on February 14, 1968. A timely petition for rehearing was denied on March 11, 1968. The jurisdiction of this Court is invoked under 28 USC 154(1).

QUESTIONS INVOLVED

I.

Whether the Secretary of Labor may institute suit under the Labor-Management Reporting and Disclosure Act of 1959 to set aside a union election on the ground of the alleged ineligibility of a candidate for one office, where the only intra-union complaint as to the election had been as to the eligibility of candidates for another office, which complaint both the union and the Secretary had ascertained, after investigation, to be unfounded.

II.

Whether the Secretary of Labor has a duty, prior to bringing suit under the Labor Management Reporting and Disclosure Act of 1959 to set aside a union election for alleged irregularity, to fairly apprise the parent union of such irregularity, pursuant to a stated policy of informing the parent union of the irregularity in order to give it an opportunity for explanation or correction.

STATUTE INVOLVED

The pertinent provisions of the Labor-Management Reporting and Disclosure Act of 1959, 73 Stat. 519, 29 USC 482 are set forth in App. 1, infra p. 29.

STATEMENT

Petitioner local union represents bartenders, maids and kitchen and dining room help employed by hotels, motels and clubs in the Detroit metropolitan area.

In preparation for the 1965 election of local officers, a nominations convention was held on June 7, 1965. Godfrey Franklin, a union member, was nominated for the office of Vice President (App. 17a).*

On June 9th, the election committee disqualified two nominees, including Franklin, because they "were not in 24 months continuous good standing", and disqualified another nominee for a different reason (App. 25a). On June 22,

* "App." refers to Plaintiff-Appellant's appendix in the Court of Appeals.

Franklin appealed his disqualification to the President of the International Union. In order to permit Franklin to perfect his appeal, the elections were postponed from July 7, to July 20 (App. 18a).

Franklin's appeal asserted that he had "fully paid" his dues, and alleged the following (App. 15a-16a):

> "The purported reason for my declared ineligibility is a sham and a crude subterfuge. The real reason is that, contrary to the wishes of Secretary-Treasurer Wolfgang, I accepted nomination for the office of Vice President in opposition to her favorite candidate, incumbent Vice President Furay—whose own circumstances relative to the alleged dues provisions have, in fact, been no different from my own. This discriminatory abuse of my rights as a member of the Local and International violates the provisions of the Labor Management Reporting and Disclosure Act of 1959 * * *." (App. p. 15a-16a)

A detailed reply to this appeal was contained in a letter from the local signed by Myra Wolfgang, its Secretary-Treasurer (App. 17a). The appeal was denied by the General President of the International on July 9 (App. 29a), and then submitted to the International's General Executive Board which voted to uphold the decision of the General President (Myra Wolfgang and the General President not voting (App. 31a, 32a)).

At the local election, Furay was unopposed for the office of Vice President and was elected with 1788 votes, although Franklin ran as a sticker candidate and received 484 votes (App. 43a, 44a).

Franklin then complained to the Secretary of Labor. Following an investigation, the Area Director of the U. S. Department of Labor, Office of Labor-Management, on January 21, 1966, wrote a letter to the General President of

the International advising him that his investigation had disclosed two alleged violations of Section 401(e) of Title IV of the Labor-Management Reporting and Disclosure Act:

> "1. Members were not afforded a reasonable opportunity to be candidates, in that candidate qualifications were not uniformly applied.
>
> 2. Members in good standing were not provided a reasonable opportunity to nominate the candidates of their choice in that only department delegates were allowed to nominate for Local office." (App. p. 33a)

A copy of this letter was mailed to the local. The letter was written pursuant to "the policy of this office—to advise the parent union—in order that an opportunity is presented—to communicate any additional evidence on the violation or any action which the parent union proposes to take to remedy the violation" (App. 33a).

On January 24, attorneys for the local replied to this letter by answering point 2 in great detail, and by requesting clarifying information as to point 1 (App. 34a). The General President also replied by requesting further information (App. 41a).

No response was made to these letters, but on January 28, the Respondent filed his Complaint in the U. S. District Court, alleging the following violation of Sec. 401(e) of the Act (29 USC 481 (c)):

> "In the said election, defendant permitted Myra Wolfgang to run as a candidate for Secretary-Treasurer, and declared her as having been elected, although she was then not qualified to be a candidate for, and to hold, office under the eligibility requirements of applicable provisions of the constitution and bylaws of the defendant and of the Inter-

national; to wit, the requirement to have maintained good standing for a period of two years. The said requirement was at the same time applied to other candidates. The union altered its dues records or permitted the records to be altered so as to conceal the facts disqualifying Myra Wolfgang. Defendant thereby violated Section 401(e) of the Act (29 U.S.C. 481 (c))." (App. p. 6a)

Petitioner filed a Motion to Dismiss on the ground (among others) that, as to the subject matter of the Complaint, it had received "no previous notice from the Secretary, and has had no opportunity to investigate and determine the merit of the Secretary's Complaint" and that "there has been no effort to exhaust the Union remedies" (App. 9a).

The District Court denied the Motion (App. 45a). Petitioner filed a Motion for Rehearing (App. 53a) which was granted and an Order entered dismissing the Complaint "in the light of the decision in *Wirtz v. Local No. 9*, 366 F.2d 911" (App. 54a).

Respondent appealed and the Court of Appeals reversed on the basis of this Court's decision in *Wirtz v. Local Union 125*, 88 S.Ct. 639.

REASONS FOR GRANTING THE WRIT

1. This case concerns the breadth to be given the decision of this Court in *Wirtz v. Local 125, supra,* and the application of that decision to a fact situation where the union did not have a "fair opportunity" to redress a member's complaint.

It is clear that, in *Local 125,* this Court held that the Secretary's authority to file suit against a union under Section 402 was not to be restricted by the precise language or specifics of the member's intra-union complaint. But we understand that decision as also holding that the member's complaint must be sufficient to give the union "fair notice", "a fair opportunity to consider and redress", or "a fair opportunity to consider and resolve" the union practice, fraud, or wrongdoing which was later made the subject matter of the Secretary's suit.

This limitation seems to be implicit in the Court statement: "We—intimate no view on the merits of the Secretary's argument that a member's protest triggers a Section 402 enforcement action in which the Secretary would be permitted to file suit challenging any violation of Section 401 discovered in his investigation of the member's complaint."

It is Petitioner's position in this case that the member's (Godfrey) appeal from his own disqualification as a candidate for Vice President because of failure to remain in continuous good standing for 24 months, could not reasonably have suggested to the union that the nominee for secretary-treasurer (Wolfgang) may have been subject to a similar disqualification. Godfrey did suggest that, even if he was disqualified, his rival candidate for vice presi-

dent (Furay) should likewise be disqualified. However, the union investigated this allegation and ascertained that Godfrey was disqualified while Furay was not. The Secretary's investigation confirmed these conclusions since the Secretary's Complaint did not allege that Godfrey was improperly disqualified or that Furay should have been disqualified.

The Court of Appeals pointed out that Godfrey's appeal did state that Secretary-Treasurer Wolfgang had favored the rival candidate Furay over him; but this contention was only intended to point up the alleged unfairness in his own disqualification, vis-a-vis, Furay, and could not reasonably have suggested to the union that some basis existed for disqualifying Mrs. Wolfgang as a nominee for another office.

The holding of the Court of Appeals, in applying this Court's decision in *Local 125* to the facts of this case would make it mandatory for a union, in investigating a member's specific complaint of improper election practices where it found such complaint to be unfounded, to extend its investigation to cover every other office involved in the election to which such a complaint might have been, but was not made.

We do not believe that a member's unfounded complaint of unfair election practice as to a specific office should automatically compel the union to conduct an investigation as to all offices. The application of such a rule would have no relationship to the kind of "responsible union self-government" which this Court adverted to in *Local 125* as a Congressional concern "in allowing the unions great latitude in resolving their own internal controversies."

It places no burden upon a member nor does it require precise language in challenging elections which he believes were improperly conducted or candidates he believes

were ineligible, to require him to specify the challenged election or candidate or office. Of course, a challenge to an improper practice, rule or conduct which, if true, would necessarily affect all elections (such as inaccessibility of the polling place) might well place in question the entire election.

But where the eligibility of a single candidate for one of many offices is challenged on a specific ground relating peculiarly to that candidate, is it logical to compel the union to conduct an investigation as to the possibility that all other candidates for all other offices might be similarly disqualified, where no one has protested their nomination or election? We suggest not.

The burden placed by the Act upon a union, we submit, is to fairly investigate and remedy complaints of improper election practices, not to compel it to conduct a full-scale investigation every time a complaint of improper disqualification of a specific candidate is made, particularly where it proves to be ill-founded.

2. A second issue, independent of the question as to the adequacy of the member's complaint, is whether the Secretary had a duty to fairly inform the union of the alleged improper election practice before filing his complaint.

After the investigation of Godfrey's complaint, Respondent's area director sent a letter to the International Union, with a copy to the local, setting forth the alleged violations of Section 401(e). The letter was written pursuant to:

> ". . . the policy of this Office in appropriate case involving violation of Title IV to advise the parent union involved of the preliminary results of our investigation in order that an opportunity is presented to the parent union to communicate any additional evidence on the violation or any action which

the parent union proposes to take to remedy the violation." (App. p. 33a.)

The violation, later made the basis of the Complaint in this case, was then described in the letter as follows:

> "1. Members were not afforded a reasonable opportunity to be candidates, in that candidate qualifications were not uniformly applied." (App. p. 33a.)

A week later Respondent filed its Complaint and, in Paragraph III, described the same violation as follows:

> "defendant permitted Myra Wolfgang to run as a candidate . . . although she was then not qualified. . . . The said requirement was at the same time applied to other candidates. The union altered its dues records . . . so as to conceal the facts disqualifying Myra Wolfgang." (App. 6a.)

In view of the fact that Godfrey, in his intra-union appeals, had never claimed that Myra Wolfgang was disqualified, Respondent's failure, in the letter which followed his investigation, to inform the union of this charge, can only be characterized as a deliberate effort to conceal it from the union and thus make it impossible for the union to investigate and remedy the alleged violation—the express purpose for which the letter was purportedly written.

In its decision in *Local 125*, this Court emphasized the Secretary's role "in protecting the public interest bound up in Title IV", and pointed out that this interest was not the narrow one encompassed in the phrase "union member's lawyer" (footnote 6). Yet, the Secretary's concealment of the real basis for his claim of election illegality in the vaguely deceptive language of his letter to the union, is precisely of the character which one might expect from

some lawyers who, in an adversary role, seek tactical advantage while giving lip service to notice requirements.

Nor was the letter treated as a mere formality by the union. As a result of the union's explanation (App. 35a-36a), the Secretary withdrew one of the two proposed grounds for his Complaint. If the basis for the remaining ground had been fairly disclosed, it may be that it, too, would have dissipated in the light of the union's explanation. At any rate, the opportunity to explain or remedy, which was the stated policy of the Secretary, was also a part of the rationale which underlay the Congressional concern that unions have an opportunity to investigate and consider complaints before they are brought into the courts.

"Responsible union self-government", to which this Court adverted in *Local 125,* cannot be expected without some degree of responsibility on the part of the Secretary to make known the essential facts upon which the union can act responsibly. The Opinion of the Court below, in ignoring this duty of the Secretary in the administration of the Act, undermines a policy upon which it rests.

CONCLUSION

For the foregoing reasons, the Petition for Certiorari should be granted.

Respectfully submitted,

GOODMAN, EDEN, ROBB, MILLENDER,
GOODMAN & BEDROSIAN,

By:.....
ERNEST GOODMAN,
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965-0050.

Dated:

APPENDIX A

No. 17920

UNITED STATES COURT OF APPEALS
For the Sixth Circuit

W. Willard Wirtz, Secretary of Labor, *Plaintiff-Appellant,* v. Local Union No. 705, Hotel and Restaurant Employees and Bartenders Union, AFL-CIO, *Defendant-Appellee.*	Appeal from the United States District Court for the Eastern District of Michigan, Southern Division.

Decided February 14, 1968.

OPINION

Filed February 14, 1968

Before Weick, Chief Judge, and Phillips and Celebrezze, Circuit Judges.

Phillips, Circuit Judge. The Secretary of Labor filed a complaint to set aside a union election on the ground that qualification standards of candidates for office had not been enforced with uniformity. The action was initiated under Title IV, §402, of the Labor Management Reporting and Disclosure Act of 1959, 29 U.S.C. §482. The purpose of Title IV is "to insure free and democratic union elections." *Wirtz v. Local Union 125, Laborers' International Union,* — U.S. —, 36 U.S.L.W. 4118, 4119 (No. 58 Jan. 15, 1968).

The election was conducted July 20, 1965. Myra Wolfgang was secretary-treasurer of the local union. Godfrey Franklin undertook to qualify as a candidate for vice president in opposition to an incumbent favored by Wolfgang. In order to qualify as a candidate, a member must have been in continuous good standing for twenty-four months prior to his nomination. The union by-laws provide that a member who is more than two months in arrears in payment of dues will be automatically suspended. The election committee of the local union advised Franklin that he did not qualify as a candidate because he had been more than two months in arrears.

Franklin thereupon sent a telegram to the election committee, care of Myra Wolfgang, dated June 15, 1965, protesting the decision that he was ineligible to run for office because not in continuous good standing. The election committee replied by informing Franklin that he had a right of appeal to the General President of the International Union.

On June 22, 1965, Franklin directed an appeal to the General President of the International Union. The appeal is attached as an appendix to this opinion.

Myra Wolfgang wrote a detailed letter to the International President contending that Franklin was ineligible to be a candidate because he had been in arrears in payment of dues for two calendar months.

Franklin's protest was overruled by the President of the International Union on July 9, 1965. He thereupon appealed to the General Executive Board of the International Union[1] and this appeal was denied.

An investigation thereupon was made by the Department of Labor, with notice to both the International Union and Local Union that one of the grounds of complaint was that "candidate qualifications were not uniformly applied." The International President informed the Area Director of the Department that "Nothing further will be done by this of-

[1] Myra Wolfgang was a member of the General Executive Board. She and the General President were recorded as "not voting" on Franklin's appeal to the Board.

fice, unless and until we are fully advised with much greater particularity of the circumstances and details concerning the alleged violations."

The complaint filed by the Secretary of Labor in this proceeding alleges that the union violated Section 401(e) of the Act, 29 U.S.C. §481(e), in the conduct of the election. The alleged violation consisted of allowing Myra Wolfgang to run as a candidate for secretary-treasurer, despite the fact that she failed to fulfill the "two years continuous good standing" eligibility requirement, while this same requirement was applied to disqualify other candidates similarly situated. The complaint further alleges that the union altered its dues records so as to conceal the facts disqualifying secretary-treasurer Wolfgang.[2]

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[2] The complaint contained the following averments:

"IV

"The defendant, purporting to act in accordance with its constitution and bylaws, conducted an election of officers on July 20, 1965. This election was subject to the provisions of Title IV of the Act (29 U.S.C. 481, *et seq.*).

"V.

"On June 15, 1965, Godfrey Franklin, a member in good standing of defendant, filed a protest of the conduct of the said election, in accordance with the constitution and bylaws of defendant and of the Hotel and Restaurant Workers and Bartenders International Union, AFL-CIO (hereinafter the International). On October 12, 1965, the General Secretary-Treasurer of the International notified him that his protest was denied. Having then fully exhausted the remedies available under the constitution and bylaws of the defendant and the International, without obtaining relief, he filed a complaint with the Secretary of Labor, on October 26, 1965, within the time specified in Section 402(a)(1) of the Act (29 U.S.C. 482 (a)(1)), alleging violations of the provision of Section 401 of the Act (29 U.S.C. 481) on the part of defendant in the conduct of the protested election.

"VI

"Pursuant to Section 402(b) of the Act (29 U.S.C. 482(b)) the Secretary of Labor investigated the said complaint and as a result of the facts shown by said investigation found probable cause to believe that

(Continued on next page)

The union filed a motion to dismiss the complaint on the ground that Frankin's protest was directed only to the office of vice president and contained no charge concerning the disqualification of Myra Wolfgang for the office of secretary-treasurer. The union argues that Franklin's complaint to the union did not give notice of the charges which are the subject matter of the Secretary's complaint, thereby depriving the union of an opportunity to investigate the charges concerning Myra Wolfgang's qualifications. It is the union's position that the Secretary has no right to maintain this action because the statute requires that the remedies available under the constitution and by-laws of the union first must be exhausted. 29 U.S.C. §482(a)(1).

Initially the District Julge denied the motion to dismiss, rendering an opinion which we find to be well-reasoned and sound. Thereafter the decision was announced in *Wirtz v. Local Unions, Nos. 9, 9A and 9-B, International Union of Operating Engineers,* 366 F.2d 911 (10th Cir.).[3] Upon the

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(*Continued from preceding page*)

violations of Title IV of the Act (29 U.S.C. 481, *et seq.*) on the part of defendant had occurred in the conduct of said election and had not been remedied prior to the filing of this action.

"VII

"In the said election, defendant permitted Myra Wolfgang to run as a candidate for Secretary-Treasurer, and declared her as having been elected, although she was then not qualified to be a candidate for, and to hold, office under the eligibility requirements of applicable provisions of the constitution and bylaws of the defendant and of the International; to wit, the requirement to have maintained good standing for a period of two years. The said requirement was at the same time applied to other candidates. The union altered its due records or permitted the records to be altered so as to conceal the facts disqualifying Myra Wolfgang. Defendant thereby violated Section 401(e) of the Act (29 (U.S.C. 481(c)).

"The violations of Section 401 of the Act (29 U.S.C. 481), found and alleged as above, may have affected the outcome of the election."

[3] Certiorari was granted and this decision was vacated for mootness. 387 U.S. 96. The Secretary's brief states that after the Solicitor General filed a petition for certiorari, the parties filed a joint suggestion of mootness, on the ground that the case had been settled in an agreement calling for a supervised election of all officers.

authority of this opinion the District Court vacated its previous order and granted the union's motion to dismiss the complaint for failure to exhaust internal union remedies. We reverse on authority of *Wirtz v. Local Union 125, Laborer's International Union, supra,* in which the Supreme Court held that in a suit by the Secretary of Labor under Section 402 of the Labor Management Reporting and Disclosure Act of 1959, the Secretary is not limited to the specific allegations made in the union member's initial complaint.

The essence of Franklin's internal complaint was that "although he paid his dues like everyone else, he was the only one disqualified." Although he alleged discrimination as between himself and the incumbent vice president, he also involved secretary-treasurer Wolfgang in his allegations, charging that the incumbent vice president was "her favored candidate" and that the real reason for his own disqualification was not the dues requirement, but the fact that he accepted the nomination "contrary to the wishes of secretary-treasurer Wolfgang." The burden of Franklin's internal complaint was that the dues requirement was being utilized in a discriminatory manner by the incumbent officers, including Myra Wolfgang, to stifle opposition.

Lacking the investigatory authority of the Secretary of Labor, Franklin could not have been expected to discover the fact later charged by the Secretary—that the union altered the dues records of Wolfgang to conceal her ineligibility to run for office under the same rule that had been used to disqualify Franklin.

The union's defense to this litigation is that Franklin's internal complaint failed to allege nonpayment of dues by Wolfgang, a fact which the union itself actively concealed. We find this defense to be untenable.

We hold that under the averments of the complaint in this case the action may be maintained by the Secretary attacking the legality of the election of the union's secretary-treasurer and other officers, even though the union member who exhausted internal remedies before the suit

was filed was a candidate for vice president. We further hold that the internal complaint filed by Godfrey Franklin in this case was adequate to give the union an opportunity to correct the violation and that the complaint is sufficient to aver exhaustion of internal union remedies in compliance with the statute. 29 U.S.C. §482(a).

The order dismissing the complaint is reversed and the case is remanded to the District Court for trial.

APPENDIX

June 22, 1965
3111 Oakman Boulevard
Detroit 39, Michigan

Mr. Ed S. Miller
General President
Hotel and Restaurant Employees and
Bartenders International Union
6 East Fourth Street
Cincinnati, Ohio 45202

Dear Mr. Miller:

I herewith appeal from the decision of the Election Committee of Local 705 that I am ineligible to run for the office of Local Vice-President of the Local Union at the pending elections, to which office I was duly nominated at the Local's convention of June 7, 1965. (My protest from such declaration of ineligibility was rejected, with direction that, if I wish, I appeal directly to you.)

The purported reason I have been declared ineligible is my alleged violation of the provisions of Article XII, Sec. 6 of the International Constitution, respecting arrearage of dues, and the provisions of Article VI, Sec. 1 of Local 705's by-laws, respecting eligibility for candidacy. The Election Committee's letter of June 9, 1965, declaring my ineligibility, is herewith enclosed.

The conclusion of the Election Committee is clearly erroneous. I have never been advised of any such infraction, nor been suspended, fined, or otherwise disciplined with respect thereto, nor been asked to pay any fee or other penalty as a condition of reinstatement; nor has the Local ever advised you, as would otherwise be its obligation under Article X, Sec. 21 of the International's Constitution, of any suspension of myself; nor has it withheld any per capita from you based upon any alleged cessation or suspension of my membership. Indeed, if Article XII, Sec. 6 of the International Constitution stands applicable, the Local itself is suspended for failure to remit to you fees otherwise alleged owing. Until now, the Local has consistently accepted my dues and that of others when tendered, has waived the purported construction of this section and its application, and is estopped to assert it now. My dues book will attest to fully paid dues without suspension at all times, as receipted by Secretary-Treasurer Wolfgang.

The purported reason for my declared ineligility is a sham and crude subterfuge. The real reason is that, contrary to the wishes of Secretary-Treasurer Wolfgang, I accepted nomination for the office of Vice-President in opposition to her favored candidate, incumbent Vice-President Furay—whose own circumstances relative to the alleged dues provisions have, in fact, been no different from my own. This discriminatory abuse of my rights as a member of the Local and International violates the provisions of the Labor Management Reporting and Disclosure Act of 1959, including Sections 401(c), 401(e) and 609, and the Constitution and by-laws of the International and Local, respectively.

In addition to the foregoing, on June 10, 1965, I was discharged as a business agent of the Local Union, also for exercising my rights as a member to participate in election procedures of the Local Union and to stand for office. The pretext given was "insubordination". I hereby appeal from the Local 705 Executive Board's ratification of that discharge, which action was taken in violation of Section 609 of the Labor Management Reporting and Dis-

closure Act of 1959, and the provisions of the International's Constitution and Local by-laws.

I take this appeal not merely to exhaust my internal remedies preliminary to the institution of appropriate action, if necessary, by myself and/or the Secretary of Labor, but in the sincere hope that the International will not tolerate this flagrant abuse of its members' rights to enjoy internal union democracy. These matters are already a source of public notoriety in Detroit, to our mutual regret. I hope you will immediately review and reverse these actions, particularly so as to afford reasonable time for me to effectively campaign prior to the election, which is now scheduled for July 20. I further request, pursuant to Section 401 of the Labor Management Reporting and Disclosure Act, that I be afforded equal treatment with all other candidates with respect to the circulation of campaign material, access to union records, and the assurance of adequate safeguards to insure a fair election, including the presence of an observer in my behalf at the polls and at the counting of ballots.

I await your prompt reply.

Yours very truly,

/s/ Godfrey Franklin
GODFREY FRANKLIN

ENCLOSURE:

cc: Local 705
Hotel, Motel & Restaurant Employees' Union
100 Selden Avenue
Detroit, Michigan

APPENDIX B

ORDER DENYING PETITION FOR REHEARING

(Filed March 11, 1968)

Before Weick, Chief Judge, Phillips and Celebrezze, Circuit Judges.

Upon consideration, it is Ordered that the petition for rehearing be and hereby is denied.

Entered by order of the Court.

/s/ Carl W. Reuss,
Clerk.

APPENDIX C

[Caption Omitted]

ORDER OF DISTRICT COURT DENYING MOTION TO DISMISS

(Filed July 26, 1966)

At a session of said court, held in the Federal Building in the City of Detroit, Michigan, on July 26, 1966.

Present: The Honorable Fred W. Kaess, United States District Judge.

This action is brought by the Secretary of Labor of the United States under the Labor-Management Reporting and Disclosure Act, 73 Stat. 519 (1959), 29 U.S.C. §§401-531[1] The complaint alleges that defendant violated Section 401-(e) of the Act (29 U.S.C. §481(e)) in the conduct of an election held July 20, 1965, by allowing Myra Wolfgang to run as a candidate for Secretary-Treasurer, despite the fact that she was not qualified to run under the "2 years continuous good standing" requirement as it was applied to disqualify persons similarly situated who were candidates for other offices. The complaint further alleges that the Union permitted the altering of its records so as to conceal the disqualifying facts.

The defendant, pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, moves to dismiss the complaint for failure to state a claim for which relief may be granted, for the reason that there has been no exhaustion of Union remedies as required by Section 402(a) of the Act (29 U.S.C. §482(a)). Section 402 provides:

> "(a) A member of a labor organization—
>
> (1) who has exhausted the remedies available under the constitution and bylaws of such organization and of any parent body . . .

[1] Hereinafter referred to simply as "the Act".

> may file a complaint with the Secretary within one calendar month thereafter alleging the violation of any provision of section 481 of this title (including violation of the constitution and bylaws of the labor organization pertaining to the election and removal of officers). . . .
>
> (b) The Secretary shall investigate such complaint and, if he finds probable cause to believe that a violation of this sub-chapter has occurred and has not been remedied, he shall, within sixty days after the filing of such complaint, bring a civil action against the labor organization . . ."

Defendant contends that although the complaining member, Godfrey Franklin, protested his disqualification through all available Union remedies, he never protested the qualifications of Myra Wolfgang, and that, therefore, there has been a failure of a condition precedent to the Secretary's complaint. Defendant relies principally upon *Wirtz v. Local Union No. 125, International Hod Carriers', Building and Common Laborers' Union of America,* 231 F. Supp. 590 (N.D. Ohio 1964), in which the Court, emphasizing that the purpose of the exhaustion of internal remedies requirement was to afford the Union the first opportunity to police its own behavior, held that where a member filed a protest with the Union respecting the validity of a run-off election, the Secretary could not challenge the validity of the original election because internal Union remedies had not been exhausted as to that election.

Defendant also relies upon the recent decision in *Wirtz v. Local Union 6, Hotel, Motel and Club Employees' Union,* 66 Civil No. 626 (July 15, 1966), in which the District Court for the Southern District of New York held that where Union members had protested only that a certain eligibility requirement was too restrictive, the Secretary could not attack the election on the grounds that the Union failed to give adequate and timely notice of the composition of its election districts, that the members' right to vote for the candidate of their choice was interfered with, and that certain offices were filled in a manner other than by election.

This Court is in complete accord with these decisions. However, the instant case involves an entirely different situation. Here, it is the application of the same eligibility requirement to candidates running in the same election, but for different offices, which is in question. The issue to be resolved is whether Godfrey Franklin's protest to the Union that the requirement of "2 years continuous good standing" had been discriminatorily applied to disqualify only him, when he had paid his dues in the same manner as everyone else in the Local, afforded the Union a fair opportunity to investigate and remedy the allegedly improper qualification of Myra Wolfgang. This Court is of the opinion that it did.

While Franklin did not specifically name Myra Wolfgang, nor allege alteration of records, he did, in his appeal to the General President of the International, allege discrimination in the enforcement of the "good standing" requirement.[2] Franklin could not have known for certain which

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[2] In this letter (Plaintiff's Exhibit E) Franklin stated, in paragraphs 3 and 4:

"The conclusion of the Election Committee is clearly erroneous. I have never been advised of any such infraction, nor been suspended, fined, or otherwise disciplined with respect thereto, nor been asked to pay any fee or other penalty as a condition of reinstatement; nor has the Local ever advised you, as would otherwise be its obligation under Article X, Sec. 21 of the International's Constitution, of any suspension of myself; nor has it withheld any per capita from you based upon any alleged cessation or suspension of my membership. Indeed, if Article XII, Sec. 6 of the International Constitution stands applicable, the Local itself is suspended for failure to remit to you fees otherwise alleged owing. *Until now, the Local has consistently accepted my dues and that of others when tendered, has waived the purported construction of this section and its application, and is estopped to assert it now.* My dues book will attest to fully paid dues without suspension at all times, as receipted by Secretary-Treasurer Wolfgang.

"The purported reason for my declared ineligibility is a sham and crude subterfuge. The real reason is that, contrary to the

(Continued on next page)

other candidates were not qualified, nor could he have known of any alteration of records. All he could protest was what he knew. That is, that, although he paid his dues like everyone else, he was the only one disqualified. Using his broad powers of investigation, after being apprised of discrimination by Franklin, the Secretary determined which other candidates were not qualified, and that certain records had been altered. The Union could also have discovered these things had it chosen to investigate thoroughly. The following statement by the court in *Wirtz v. Local Union 169, International Hod Carriers', Building and Common Laborers' Union of America*, 246 F. Supp. 741 (D.Nev. 1965) is apropos to the present case:

> "The act should receive a practical interpretation governed by common sense and realities. If Congress intended that the union member assert a lawyer-like protest to the Executive Board, covering all the bases by specific averment, and buttressed by evidence of all irregularities in the election, there would be no occasion for an evidentiary investigation by the Secretary. Such an interpretation restricts the Act to a definition of remedies and establishment of jurisdiction in this Court for the vindication of essentially private rights, and de-emphasizes to the point of emasculation the public interest which prompted Congress. . . .
>
> "The act should be construed to mean that *the Secretary has*, on complaint of a union member, *the right to investigate all aspects of the contested election and to base a complaint to the Court on every issue which*

(Continued from preceding page)

> wishes of Secretary-Treasurer Wolfgang, I accepted nomination for the office of Vice-President in opposition to her favored candidate, *incumbent Vice-President* Furay—*whose own circumstances relative to the alleged dues provisions have, in fact, been no different from my own. This discriminatory abuse of my rights as a member of the Local and International violates the provisions of the Labor Management Reporting and Disclosure Act of 1959*, including Sections 401(c), 401(e) and 609, and the Constitution and by-laws of the International and Local, respectively." (Emphasis supplied.)

the defendant union had a fair opportunity to consider and resolve in connection with any member's appeal to the General Executive Board of the union. The Secretary should not be limited to the ground asserted by the one member who complained to the Secretary. Such an approach will preserve the union's first right to correct its own procedures and will help to avoid the intolerable situation which will result if the union is permitted to treat the separate complaint of each appealing member as an isolated 'case' filed for vindication of the personal rights of the member and without regard for the public interest asserted by the Labor-Management Reporting and Disclosure Act of 1959."[3] (Emphasis supplied.)

Assuming the well-pleaded allegations of the complaint to be true, as must be done on a motion to dismiss,[4] the eligibility requirements were unfairly applied and the records tampered with, to make Myra Wolfgang eligible and Godfrey Franklin ineligible. Clearly, the court should hear the evidence and then determine whether the validity of the elections of all or some of the officers were impaired.[5] As was stated by the Court in *Wirtz v. Local 191, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America,* 226 F. Supp. 179 (D. Conn. 1964):

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[3] The Secretary's function under Title IV of the Act is analogous to that of the General Counsel of the National Labor Relations Board in relation to charges of unfair labor practices under the Taft-Hartley Act. Once a charge has been made, the N.L.R.B. investigation and complaint are not confined to the specific details of the charges but may extend to related matters of the same class of violations charged. *N.L.R.B. v. Fant Milling Co.,* 360 U.S. 301 (1959); *N.L.R.B. v. Lasko Metal Products,* Civil No. 16520 (6th Cir., July 7, 1966). 29 U.S.C. §160(b).

[4] *Clark v. Uebersee Finanz-Korporation, A.G.,* 332 U.S. 480 (1947); *Wilhide v. Keystone Ins. Co.,* 195 F. Supp. 659 (M.D. Pa. 1961); 2 Moore, Federal Practice, ¶12.08 p. 2244 (2d ed. 1964).

[5] If at the conclusion of the proofs the evidence shows otherwise, an appropriate motion may be made.

"The Court is not bound to confine itself just to the one person who processed the thing; nor is the Court compelled to set aside the entire election. It is a matter of judging the thing on the evidence and deciding whether this invalidity or violation did have a damaging effect on the election of other officers beside the one with which we are particularly concerned."

Defendant further contends that the action was not timely filed. Section 402(b) of the Act (29 USC §482(b)) provides that, after the Secretary finds probable cause to believe that election violations have occurred and have not been remedied, he shall "within sixty days after the filing of [the member's] complaint" institute a civil action to set aside the election. However, in *Wirtz v. Local Union 611, International Hod Carriers' Building and Common Laborers' Union of America*, 229 F. Supp. 230 (D. Conn. 1964), consideration was given to the factors inhibiting the Secretary from commencing the action within the set period, and in *Wirtz v. Great Lakes District Local No. 47, International Organization of Masters, Mates & Pilots*, 240 F. Supp. 859 (N.D. Ohio 1965), it was held that where the Union refused to produce certain records until after court action, the period of the Union-caused delay was not to be counted.

The Secretary alleges, and defendant does not deny, that the defendant refused to produce records until court action was taken, thus causing a 35-day delay. With the addition of this 35 days to the 60-day period, the action was timely filed.

Defendant's remaining grounds for dismissal have been neither briefed nor argued orally, and appear to be without merit.

It Is Ordered, therefore, that defendant's motion to dismiss is denied.

Fred W. Kaess,
United States District Judge.

APPENDIX D

[Caption Omitted]

ORDER OF DISTRICT COURT GRANTING DEFENDANT'S MOTION TO DISMISS AND VACATING ORDER OF JULY 26, 1966

At a session of said Court held in the Federal Building at Detroit, Michigan, this 23rd day of December, 1966.

Present: Honorable Fred W. Kaess, District Judge.

This court having issued, on July 26, 1966, an order denying defendant's motion to dismiss the complaint for failure to state a claim for which relief can be granted,

The matter having come before the court on defendant's motion for a rehearing; and

The court having reconsidered the matter in the light of the decision in *Wirtz v. Local Nos. 9, 9-A, 9-B, International Union of Operating Engineers,* 366 F. 2d 911 (10th Cir. 1966);

It Is Ordered that the order of July 26, 1966, is vacated and that the defendant's motion to dismiss the complaint is granted.

Fred W. Kaess,
District Judge.

APPENDIX E

STATUTE INVOLVED

Section 402 of the LMRDA, 29 U.S.C. 482, provides in relevant part as follows:

> Sec. 402(a). A member of a labor organization—
>
> (1) who has exhausted the remedies available under the constitution and bylaws of such organization and of any parent body, or
>
> (2) who has invoked such available remedies without obtaining a final decision within three calendar months after their invocation,
>
> may file a complaint with the Secretary within one calendar month thereafter alleging the violation of any provision of section 401 * * *.
>
> (b) The Secretary shall investigate such complaint and, if he finds probable cause to believe that a violation of this title has occurred and has not been remedied, he shall, within sixty days after the filing of such complaint, bring a civil action against the labor organization as an entity in the district court of the United States in which such labor organization maintains its principal office to set aside the invalid election, * * *.
>
> (c) If, upon a preponderance of the evidence after a trial upon the merits, the court finds—
>
> (1) that an election has not been held within the time prescribed by section 401, or
>
> (2) that the violation of section 401 may have affected the outcome of an election,

the court shall declare the election, if any, to be void and direct the conduct of a new election under supervision of the Secretary and, so far as lawful and practicable, in conformity with the constitution and bylaws of the labor organization. The Secretary shall promptly certify to the court the names of the persons elected, and the court shall thereupon enter a decree declaring such persons to be the officers of the labor organization. * * *

SUPREME COURT, U. S.

FILED

JUL 6 1968

JOHN F. DAVIS, CLERK

No. 170

In the Supreme Court of the United States

OCTOBER TERM, 1968

LOCAL UNION NO. 705, HOTEL AND RESTAURANT EMPLOYEES AND BARTENDERS UNION, AFL-CIO, PETITIONER

v.

W. WILLARD WIRTZ, SECRETARY OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 13) is reported at 389 F. 2d 717. The opinion and order of the district court denying the motion to dismiss (Pet. App. 22) is unofficially reported at 63 L.R.R.M. 2315; the order of the district court granting the motion to dismiss and vacating its previous order (Pet. App. 28) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on February 14, 1968. A timely petition for rehearing was denied on March 11, 1968. A petition for a writ of certiorari was filed on June 7, 1968. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, in the circumstances of this case, a union member's internal complaint challenging a union election was sufficient to raise the questions presented by the Secretary of Labor in his action seeking to set aside the election under Title IV of the Labor-Management Reporting and Disclosure Act of 1959.

STATUTE INVOLVED

The relevant provisions of Section 402 of the Labor-Management Reporting and Disclosure Act of 1959, 29 U.S.C. 482, are set forth at pp. 29-30 of the Appendix to the petition.

STATEMENT

Petitioner is a local union representing hotel, motel and club employees in the Detroit metropolitan area. Godfrey Franklin, a union member nominated for the office of Vice President, was disqualified by the union's election committee on the ground that he failed to meet the requirement that candidates must have been in continuous good standing for 24 months prior to nomination. (Under the union by-laws, any mem-

ber more than two months in arrears on his dues lost his good standing.) Franklin appealed his disqualification to the President of the International Union, making the following assertion (App. 15a-16a):[1]

> The purported reason for my declared ineligibility is a sham and a crude subterfuge. The real reason is that, contrary to the wishes of Secretary-Treasurer Wolfgang, I accepted nomination for the office of Vice President in opposition to her favored candidate, incumbent Vice President Furay—whose own circumstances relative to the alleged dues provisions have, in fact, been no different from my own. This discriminatory abuse of my rights as a member of the Local and International violates the provisions of the Labor Management Reporting and Disclosure Act of 1959 * * *.

After this appeal was denied, Franklin filed a complaint with the Secretary of Labor. The Secretary investigated the complaint and then filed suit, charging that the union violated the Act by permitting Myra Wolfgang to run for the office of Secretary-Treasurer notwithstanding that she did not comply with the two years' good standing requirement, while this requirement was applied to disqualify other candidates.[2] In addition, the Secretary alleged that the union "altered

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[1] "App." refers to the appendix to the brief for appellant in the court of appeals.

[2] Section 401(e) of the Act requires that in union elections every member in good standing shall be eligible to run for office, subject to "reasonable qualifications uniformly imposed." 29 U.S.C. 481(e).

its dues records or permitted the records to be altered so as to conceal the facts disqualifying Myra Wolfgang * * *." (App. 6a).

The union moved to dismiss the complaint, asserting that the Secretary could not challenge the election on the ground that Mrs. Wolfgang had not been subjected to the dues paying requirement because Godfrey Franklin's internal complaint had alleged discrimination only as between him and Vice-President Furay. The Secretary's complaint alleged discrimination as between Franklin and Mrs. Wolfgang. The district court initially denied the motion (Pet. App. 22-27). However, after the Tenth Circuit decided *Wirtz* v. *Local Unions Nos. 9, etc., International Union of Operating Engineers*, 366 F. 2d 911, vacated for mootness, 387 U.S. 96,[3] the district court vacated its prior order and dismissed the complaint.

The court of appeals, agreeing with the district court's first opinion, reversed and remanded for trial on the authority of this Court's intervening decision in *Wirtz* v. *Local Union No. 125, Laborers' International Union*, 389 U.S. 477 (Pet. App. 17).

ARGUMENT

1. The decision below correctly applies this Court's decision in *Wirtz* v. *Local Union No. 125, Laborers' International Union, supra.* Here, as in that case, the union had a "fair opportunity" to consider and resolve the violation charged by the Secretary in con-

[3] *Local No. 9* was vacated on the basis of a settlement agreement calling for a supervised election.

nection with the union member's internal complaint. As the court of appeals noted, the internal complaint charged nonuniform application of the dues requirement, and involved Mrs. Wolfgang in the alleged violation. To be sure, the union member failed to charge that Mrs. Wolfgang was ineligible to run under the dues requirement. But "Congress having given the Secretary a broad investigative power cannot have intended that his right to relief be defined by a complaining member's ignorance of * * * the facts" (389 U.S. at 485)—especially in a case where the union has altered records that would have revealed the true facts.

2. Although not required by statute, the Secretary's policy is to notify a union in advance of suit of all violations disclosed by the investigation, so that the union may take voluntary corrective action. The instant record by no means shows the lack of such notice which petitioner claims since the district court did not reach the point and, therefore, did not inquire into the full course of communication between the Secretary and respondent. Consequently, even if notice is necessary, the question is not presently ripe for review. And it is surely difficult to understand what difference formal notification would had made here—where respondent allegedly altered the records showing Mrs. Wolfgang's ineligibility for office.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JULY 1968.

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